SUPREME COURT OF QUEENSLAND

Queensland Law Society Vincents' Symposium 2010
Brisbane Convention and Exhibition Centre
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Opening address

The Hon Paul de Jersey AC
Chief Justice

It is always a great pleasure to be with you, and to have the opportunity to speak from this podium.

In anticipation of the following panel discussion a little later, I wish to dwell for a short time this morning on the subject of national profession reform. It is, I suggest, the topic of significance which we all should be considering and addressing at this time.

From the point of view of the courts of law, the operation of the legal profession is of critical concern. The courts depend on an efficient, ethical profession in which disputants and potential disputants have confidence; along with those who rely on expert assistance in non-contentious matters. But there is a supervening characteristic, beyond efficiency and ethical commitment, which is pivotal. It is upon the independence of the profession that I wish to speak this morning.

Independence is important for public trust in the profession. But it is also critical to perceptions of the judiciary drawn from the profession. If only because there can be no compromising the independence of the judiciary, there can be no compromising the independence of the source from which it is drawn.

Former Justice Davies developed these aspects in February this year when addressing Readers of the Bar Practice Course. He said that "what distinguishes a profession" is that "it should have the power to regulate itself." He then observed that "the independence of (the legal) profession, which necessarily involves its self-regulation, is an essential adjunct to the independence of the judiciary".

In relation to any current model for reform of the profession nation-wide, I remain principally concerned about the absence of an assurance that appointees to the proposed peak regulatory body, the National Legal Services Board, will be made, at least as to the majority, by the profession including the judiciary. I am talking about who appoints, not who is appointed. I am not for one moment suggesting, for example, that all board members need be lawyers. There would be a very strong case for lay consumer representation. My concern rests in the power to appoint to a National Legal Services Board, the body which would determine national standards on a number of important matters, including admission, suitability for admission, practising entitlements, professional conduct and business practice. Those matters, especially the setting of ethical standards, go to the heart of the profession. I cannot see how the legal profession will remain "independent" if effectively governed by a body substantially appointed by the executive government, and that is a proposal which, I understand, remains on foot. It would signal a seismic shift in the dynamics of the legal profession in this nation, a shift which would I suggest be inimical to the maintenance of public confidence in the independent administration of justice.

I will endeavour to explain why. The importance of upholding the independence of the legal profession from executive government appears distinctly when the State is a litigant or claimant, which is the case for all criminal work, and a lot of civil work. The other party to the claim may think it unfair that the executive government of the State delineate the framework within which that party's legal representatives may operate, with concern, naturally felt if in fact misfounded, that the executive government would principally be doing its best to establish a framework favourable for the disposition of the business of the State.

We see that, perhaps, in our State's legislative stipulation for the mediation of workplace claims, which undoubtedly protects the financial position of the government agency WorkCover, while leaving an unrepresented claimant, in particular, possibly more exposed

and vulnerable before a mediator than he or she would be before a judge. Now I am not to be taken as disavowing the patent desirability of mediation, but the example does, I think, show how sensitive the interface between the independent profession and executive government is.

In some jurisdictions which have turned their faces against the rule of law, the profession has been denied independence; in Zimbabwe for example, where I understand practitioners who do not undertake to promote government policy in their practice can find it difficult to obtain a practising certificate.

Legal professional privilege is one of the principal hallmarks of a lawyer's capacity independently to promote the client's cause. There has in Australia been some erosion of that privilege over the years. Imagine a scenario where defence counsel were obliged to reveal to the prosecution all he or she knew about the accused as a condition of the right to defend the client. That nightmare may be rejected as a piece of fancy, something which could never happen in this enlightened place. I imagine however that similar sentiments would have been expressed at the time of the election of Robert Mugabe in Zimbabwe.

Erosion of rights is said to be inevitable with the advent of international terrorism and its ilk. If so, the challenge is to minimize the erosion, to stem any tide.

Preserving the independence of the profession is critical, extending to the capacity of the profession to stand boldly between State and citizen, with the profession expressing, with a respected voice, opposition to State initiatives seen to imperil individual rights and freedoms.

I struggle to identify a profession regulated by governmentally appointed boards. Certainly there are disciplinary tribunals so constituted. But a peak regulatory board which delineates the professional landscape as presently proposed here?

The case law is replete with reminders of the importance of maintaining the true independence of the profession. Justice McHugh was speaking of the independence of the bar in *D'Orta–Ekenaike v Victoria Legal Aid* (2005) HCA 12, para 105, but in principle what he said is applicable to the whole profession. His Honour said this:

> "In Australia, advocacy in the courts is principally carried out by those admitted as, or practising exclusively as, barristers. In Australia, the barrister, like the solicitor, is an officer of the court, as indispensable to the administration of justice as the judge. Without an independent bar, investigating and arguing the legal rights and duties of members of the public in the courts and assisting in the administration of justice, the cost of administering justice would increase dramatically. Government functionaries or perhaps the judges themselves, would have to take on the role of the advocates. They would have to engage in many out of court activities that are now carried out by members of the bar. That would include the investigating, researching and presenting claims and defences in the great majority of cases…the independence of the bar in large part therefore secures the independence of the judiciary. It seems highly unlikely that public confidence in the administration of justice could be maintained at its present level if the administration of justice in all its aspects was a government monopoly." (emphasis added)

I also quote if again at some length from a decision of the Supreme Court of Canada, *Attorney-General of Canada v Law Society of British Columbia* (1982) 2 RCS 207, per Justice Estey, pp 335-6:

> "There are many reasons why a province might well turn its legislative action towards the regulation of members of the law profession. These members are officers of the provincially organized courts; they are the object of public trust daily; the nature of the services they bring to the public makes the valuation of those services by the unskilled public difficult; the quality of service is the most sensitive of service regulation and the quality of legal services is a matter difficult of judgment. The independence of the bar from the State in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the State must, so far as by human ingenuity it can be so designed, be free from State interference, in the political sense, with the delivery of services to the individual citizens in the State, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the bar and through those members, legal advice and services generally. The uniqueness of position of the barrister and solicitor in the community may well have led the Province to select self-

> administration as the mode for administrative control over the supply of legal services throughout the community." (emphasis added)

Finally, I mention these sentiments expressed in an article published in The Australian Bar Review ((2005) 26 ABR 133) by then Justice Kirby:

> "An independent legal profession…requires that lawyers be free to carry out their work without interference or fear of reprisal. Lawyers have a duty, within the law, to advance the interests of their clients fearlessly and to assist the courts in upholding the law. To enable them to perform these duties it is necessary that lawyers enjoy professional independence. Challenges to such independence can arise where lawyers are not able to form independent professional organizations; are limited in the clients whom they may represent; are threatened with disciplinary action, prosecution or sanctions for undertaking their professional duties; are in any other way intimidated or harassed because of their clients or the work that they undertake; or are subjected to unreasonable interference in the way they perform their duties."

Importantly he added:

> "Independence is not provided for the benefit or protection of judges or lawyers as such. Nor is it intended to shield them from being held accountable in the performance of their professional duties and to the general law. Instead, <u>its purpose is the protection of the people, affording them an independent judiciary and legal profession as 'the bulwark of a free and democratic society'</u>." (emphasis added)

I repeat that I consider it indisputably critical that the majority at least of appointees to this potentially very significant regulatory board be made by the profession including the judiciary, not by executive government.

It may be said in response that currently a number of Legal Services Commissioners around the nation are appointed on the nomination of Attorneys-General. That may be, but the role of the Queensland Commissioner, as an example, when dealing with complaints is relevantly limited to the prosecution of errant practitioners. Also, while applicable conduct rules amount to subordinate legislation, they are substantially developed by the professional bodies and reflect the judicial edicts to be found in the judgments of the courts and, in this State, the Legal Practice Tribunal, which though not a

court, is constituted by a Supreme Court Judge. It would be absurd to contemplate such standards being set by people unfamiliar with practice.

There is much to commend the view that the body responsible for setting professional standards should be guided directly by those who, through active practice, understand the practical ramifications of discharging their duty to the court, as officers of the court, and their duty to the client and more broadly the community. Those practical ramifications extend to considerations of costs, time and the application of resources, which can bear on the burden ultimately borne by the client. It is really important that those setting professional standards actually understand what practice involves.

Having mentioned those practical considerations, I must however revert to the importance of acknowledging the special nature of the relationship between lawyer and client. It is not like the relationship of supplier to consumer, vendor to purchaser. It is a relationship specially characterized by the expectation, and correlative duty, of confidentiality and privilege, and of exemplary professional ethics. The client accepts that the lawyer is to guide the matter appropriately through the legal process or system, and expects the lawyer to do so. That need usually arises from what has been termed an "information asymmetry". But it does not mean that the delineation of the professional relationship should follow some sort of business model. Whatever emerges from the present reconsideration of the state of the profession must respect that essential character of the professional relationship.

I emphasize the need for comprehensive consultation. The original timeline, with a draft bill and rules to go to COAG by the end of April, was, I respectfully suggest, unduly optimistic and demanding. There is much to commend the view that COAG should not consider approving a proposal, even in principle, until after all other interested parties have had a full opportunity to consider and submit submissions on such drafts.

Finally, I again express my abiding concern about the cost of any new system. The proposed National Legal Services Board, the Standards Advisory Committees, and a National Legal Ombudsman, will not come inexpensively. One may ask who will be called upon to bear the cost. The existing legitimate demands in this State on the interest on trust accounts fund are substantial. Our present system here works well. It would be unfortunate were Queensland taxpayers, or Queensland practitioners, required to subsidize the cost of a new national system. Interacting regularly with practitioners from regional Queensland, I am struck by their utter dedication. I would be very concerned were the viability of practice in centres in outback Queensland in particular jeopardized by any new financial impost.

Across Australia, and particularly in this State, at least 80% of all lawyers practise in what equate to quite small businesses, that is, practices with no more than two to five principals. The cost of complying with any new national regime must not impact in any substantial way on their being able to continue with those practices. Reduction in access to small law firms impacts directly on the community's general access to justice. That effect magnifies as one moves away from major population centres into regional, rural and remote areas, a risk uniquely relevant in Queensland.

I urge decision-makers to be astute to these concerns, all acutely felt in this major Australian jurisdiction.

I am sure you know, ladies and gentlemen, how much I relish the opportunity to meet with and address you on this occasion – as well as many others through the year.

The quality of your work, evident to me, and the professional dedication which underpins it, hearten me in my conviction of the optimal delivery of legal services in this great State. For your important continuing role in assuring that, I express, as your Chief Justice, my gratitude.

You all have my best wishes as we move forward into another year in the discharge of our publicly important joint mission.